WARN Act and its Implications for COVID-19 Layoffs and Furloughs

Labor & Employment Law Update

By John Hayes on April 1, 2020

The federal Worker Adjustment and Retraining Notification (WARN) Act and the patchwork state-law equivalents are often overlooked when employers are considering their options regarding potential layoffs or furloughs – either permanent or temporary. Employers should be cautioned that not abiding by the requirements of the WARN Act could lead to problems down the road.

The WARN Act requires employers with 100 or more employees to give an advance 60-day written notice to its displaced workers, certain third parties, and government bodies notice for a plant closing *or* mass layoff. A *plant closing* means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss of 50 or more employees during a 30-day period. A *mass layoff* means a reduction in force that is not the result of a plant closing which results in either an employment loss of 500 or more employees, or an employment loss of at least 50 or more employees and at least 33% of the active workforce at the site during a 30-day period. This 30-day period may be increased to 90 days if there is a series of small employment loss events that do not individually meet the threshold numbers above. We should also note that part-time employees (those working less than 20 hours a week) and those who have worked less than 6 of the previous 12 months are excluded from the calculation of affected employees. Under federal WARN, temporary layoffs of less than 6 months are not counted as an employment loss.

The DOL guidance on the WARN Act can be found on the DOL website.

Given the current circumstances, an advance 60-day notice will likely not be possible for most employers. The WARN Act contains three exceptions to the advance notice requirement, the applicable one currently mostly likely being the "unforeseen business circumstances" exception. While this exception may apply to COVID-19 — and this, the 60-day advance notice would then be excused, ***notice is still required to be given*** in the event of a plant closing or mass layoff. Also, as more time passes, the "unforeseen business circumstances" exception is likely weakened.

The available penalties under the WARN Act are not insignificant and include the possibility of potential class action suits. An employer who violates WARN is liable to each affected employee for an amount equal to back pay and benefits for the period of violation, up to 60 days. Moreover, an employer who fails to provide notice as required to a unit of local government is subject to a civil penalty not to exceed $500 for each day of violation. In any suit, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

While the above discusses the federal WARN Act, it is important to note that several states have their own "mini-WARN" laws that may impose different or more strict requirements, may not include the "unforeseen business circumstances" exception or other exceptions, may encompass a different employee count, and/or may consider temporary/short lay-offs as triggering notice requirements. For example, New York requires advance notice of 90 days. Illinois requires employers with 75 or more employees to give notice, as opposed to the 100-employee trigger under federal law.

The Bottom Line: Out of an abundance of caution employers should consider sending out WARN notices to their employees, third parties (as applicable), and the relevant government authorities in the event of a plant closing, mass layoff or furlough, even if temporary. Any business contemplating closures or layoffs or furloughs (either long or short-term) of a significant number of employees should seek advice and counsel from competent employment and labor law counsel. The risks are just too great!